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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

NELLIE COPELAND, Admnx. of the Estate of JOHN W. HERTZ, Deceased,
Respondent.

No. 733

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Missouri
and
BRIEF IN SUPPORT THEREOF.

JOSEPH A. McCLAIN, JR.,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.

302 Union Station,
St. Louis, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Cases Cited.

Statutes Cited.

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered September 5, 1944, rehearing in which and motion to transfer to said Court en banc were denied October 9, 1944, by Division One of the court below, in this cause lately there pending, styled Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, respondent, vs. Terminal Railroad Association of St. Louis, a corporation, appellant, No. 38,934, on the docket of the

court below, affirming a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of respondent and against your petitioner herein.

Your petitioner further states that the Missouri Supreme Court en banc will not entertain a motion to transfer any cause from one division thereof to court en banc.

OPINION OF THE COURT BELOW.

The opinion of the court below in said cause of Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, vs. Terminal Railroad Association of St. Louis, a corporation, appellant, which is by this petition sought to be reviewed, appears on pages ... to ..., both inclusive, of the printed transcript of the record filed herein. Petitioner is unable at this time to include herein the citation of the opinion of the court below in said cause, either in the Southwestern Reporter or in the official volumes of the Missouri Reports, because said opinion has not yet appeared in either of those publications.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 334, providing for review in this Court by certiorari of decisions of the highest courts of the several states wherein a title, right, privilege or immunity especially set up is claimed under a statute of the United States. Authorities sustaining the jurisdiction are:

> Steeley v. Kurn et al., 313 U. S. 256, 61 S. Ct. 934;
> Brady v. Southern R. Co. (not yet published in the official U. S. Reports), 88 L. ed., Adv. Op. 189, 191.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act), 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, in her capacity as Administratrix of the Estate of John W. Hertz, to recover from petitioner damages for the death of her said intestate. John W. Hertz was killed on December 16, 1941, in the State of Illinois, when he was crushed between the edge of a loading dock belonging to the Federal Barge Line and a portion of a freight car which was being moved on a track immediately adjacent to the loading dock.

Respondent's petition alleges that while Hertz was in a position of imminent peril of being struck and injured by the movement of petitioner's train, petitioner was guilty of negligence in the following respects: (1) caused the train to be suddenly and unexpectedly backed with great force and violence; (2) that the locomotive was defective in that the engine, air hose, air brakes and brake pins were disconnected; (3) that petitioner's agents and servants permitted said train of cars to be driven backward with great force and violence, knowing that the air brakes were inadequate and insufficient to hold the train; (4) that petitioner's servants caused and permitted the air brakes on its train to be released, thereby causing and permitting said train to move backward with unusual speed; (5) that the car which crushed Hertz between the edge of the loading platform and the side of the car was of unusual width, whereas the space between the side of the car and the loading platform was insufficient for Hertz to pass, nevertheless, petitioner's servants caused and permitted the train to be driven backward with great force and violence; (6) petitioner's servants left decedent in charge of an inexperienced and incompetent apprentice switchman, and decedent's foreman placed himself in a

position where he could neither hear nor observe signals given by decedent, and while decedent was in such place of imminent peril, his foreman signaled the engineer to release the air brakes and back the train.

Petitioner answered by admitting that decedent was killed at the time and place mentioned in respondent's petition, that he was at that time engaged in interstate transportation, and denied every other allegation of respondent's petition. Petitioner further pleaded that decedent had assumed the risk or danger of standing at the point where he was standing when injured, because the danger was open and obvious and well known to him.

Decedent and his switching crew were engaged in placing certain cars on a dock belonging to the Federal Barge Line on the eastern bank of the Mississippi River opposite St. Louis, Missouri. Petitioner's switch track ran down to the edge of the water and thence over a cradle to a barge lying along the east side of a loading dock of the Federal Barge Line. It was the duty of decedent's switching crew to place empty cars alongside the dock so that they could be loaded from the dock. The switch track leading south from petitioner's switch yard down to the river bank declines very sharply to the river bank. Beyond the river's edge there is an incline up to the barge, and beyond the north end of the barge the track is for all practical purposes level. The cradle over which the cars pass from the river's edge to the north end of the barge is not sufficiently strong to permit the passage of a locomotive over it (R. 76). Consequently, it is necessary to have attached to the locomotive cars in addition to those which are to be left on the barge at the appointed places.

There are five particular spots called positions on this barge at which cars are regularly spotted for loading purposes. The position called No. 1 is farthest south and the position called No. 5 farthest north. On the occasion in question four cars were to be spotted at positions Nos. 2 to 5, both inclusive (R. 21).

During the switching operation and after the cars had reached the point where they were to be left, it was necessary to uncouple the fourth from the fifth car from the south end. In the meantime, however, a stop had been made not quite at the proper position. Consequently, the switch foreman gave a signal which was passed to the engineer to pull the cars toward the north, which stretched out the slack in the train (R. 37). About that time the dock foreman indicated that it would be satisfactory to leave the cars as they were, whereupon the switch foreman gave a stop signal and the forward movement of the cars was stopped (R. 37).

Decedent had been in petitioner's employ about five years (R. 66), had been working with that particular crew which spotted cars on this barge for more than a year (R. 35), and during that year had helped spot cars on this barge practically every night (R. 36).

At the time the string of cars was stopped and the point had been reached when it was necessary to uncouple them, decedent who had been walking along on the loading dock came up to the point where the cars were to be uncoupled, got down off the loading dock, went between the ends of the fourth and fifth cars from the south end, reached over and shut the angle cocks on both of them, and disconnected the air hose between the two cars (R. 23). It was necessary to disconnect this air hose in order to permit the air brakes to operate on the remainder of the cars and to set the brakes on the four cars (R. 23). After decedent had disconnected the air hose between the two cars, he reopened the angle cock on the north end of the fourth car which was to be left on the track, for the purpose of draining the air from the reservoirs on the four cars and setting the brakes on all four of them (R. 23). He permitted the angle cock on the south end of the fifth car, which was to remain a part of the train, to remain closed in order to permit the air brakes between

that point and the locomotive to continue operating (R. 23). As a consequence of reopening the angle cock at the north end of the last car which was to remain on the barge, the air brakes on that and the three cars south of it were fully set, thus preventing the movement of the four cars to any appreciable extent (R. 38).

After decedent had properly set the angle cocks on the cars and had uncoupled the air hose, the switch foreman, Daly, who was on top of the first car north of where the uncoupling was to be made, walked from the south end to the middle of the car (R. 24), so that when the movement came he could not possibly be thrown over the end of the car (R. 24, 32). After the switch foreman had reached the middle of the car he could no longer see decedent who was down on the track (R. 24); consequently, decedent had to inform Daly by word of mouth when he desired the slack to be given him in order to permit him to uncouple the cars, as the switch foreman could not see a lantern signal by decedent (R. 31). In due time, decedent shouted to his foreman a request to give him the slack (R. 30, 104). Thereupon the switch foreman passed the signal to the head brakeman who was standing on top of the third car from the locomotive (R. 96). The head brakeman then passed the signal to the engineer (R. 27).

The slack could not be given immediately for the reason that after the signal for slack is given to the engineer, from three to five minutes are required for the air pump on the locomotive to increase the air pressure to a sufficient extent that the brakes may be released and the slack given (R. 31, 32). In due time the slack which had been called for by decedent was given, and it was during that slack movement that he was killed.

There was but one eye-witness to this fatality, a student brakeman whom decedent and the other members of his crew were teaching. This student brakeman was working

primarily with decedent who was showing him how to become a switchman (R. 99). He was standing on the loading dock just above decedent at the time the latter was killed, and saw him get caught between the car and the loading dock (R. 99). The student brakeman, whose testimony was not impeached or in any way contradicted, and could not be because he was the sole eye-witness, testified that decedent was caught "just as soon as the movement started" (R. 100); "he got caught immediately" (R. 105). When the movement was stopped, decedent was caught between the loading dock and the ladder on the south end of the side of the fifth car (R. 100).

The space between the side of a car and the edge of the loading dock was four to six inches (R. 19), and between the ladder on the side of a car and the edge of the loading dock was approximately three or four inches (R. 29). The ladder on the side of the car was about three or four inches from the south end of the car where decedent was (R. 29).

The switch foreman testified that at the time the slack movement occurred, that portion of the train which was coupled to the locomotive moved from a foot to a foot and a half (R. 28). The student brakeman thought that the cars moved between two and four feet (R. 99, 105). The head brakeman testified that the car he was on (third from the locomotive) moved not over four or five inches (R. 96). The locomotive scarcely moved, not over six or eight inches (R. 80). On the other hand, the dock foreman testified that the four cars to be left at the loading dock moved "at least twelve feet" (R. 51); "probably the best of my thought is twelve feet" (R. 56); but he did not know how far the car which killed decedent moved (R. 56).

When the movement had been stopped, decedent's body was found to be caught between the platform of the dock and the ladder on the west side and near the south end of

the last car which was coupled to the locomotive (R. 29, 52). Decedent's neck was just about in the middle of the ladder and one of the rungs of the ladder "was bent in towards the side of the car" (R. 64).

There were two tracks on this barge, the west track where decedent was standing, and the east track (R. 36). On all occasions except this one, respondent and all other switchmen had switched the west track while standing on the east side of it or while standing on the west side of the east track (R. 35, 36, 39). On this occasion decedent stood on the west side of the west track, although the east track was clear of cars at that time (R. 38), and nothing prevented decedent from working from the east side of the west track, as everyone had done prior to this time, and where he could have uncoupled the cars with perfect safety (R. 38).

Although the switch foreman had seen decedent standing between the cars and immediately adjacent to the loading platform, just prior to the time decedent gave the signal for the slack movement, the switch foreman had no idea that decedent would remain in that position, but supposed that he would move over to the east side of the track where he could make the uncoupling in perfect safety (R. 36).

Decedent, as a member of this particular crew for more than a year (R. 35), had made this same switching movement for the purpose of "spotting" cars on this barge practically every night during that year (R. 36), and at no time theretofore had stood anywhere but on the opposite side of the track from where he was killed (R. 36). Prior to the occasion of decedent's death, all switchmen who did this kind of work and switched cars on this barge worked from the east side of the track instead of the west side of the track where decedent was at the time of his fatal injury (R. 36, 59, 98).

Respondent submitted her case to the jury upon the hypothesis that petitioner's negligence consisted in making this slack movement "with unnecessary and unusual force and speed" (R. 110).

QUESTIONS PRESENTED.

I.

Did decedent voluntarily and knowingly assume a position of imminent danger when he stood between the ends of the two freight cars where the uncoupling operation was to be done, and then signal for a sufficient movement of the train to give him the necessary slack to make the uncoupling operation possible, when he could have avoided all danger by standing on the opposite side of the track where he and all other switchmen prior to that occasion had stood to uncouple cars?

The court below stated in its opinion that "the jury could draw the inference that there was no certain danger of extreme peril, nor even negligence, in the manner in which Hertz was proceeding to lift the pin."

II.

If decedent chose a position of imminent and certain peril rather than one of safety and then signaled for the movement of the train to give him the slack which would enable him to uncouple the cars, were his own actions in so doing the sole proximate cause of his death?

III.

If the evidence showing that the proximate cause of decedent's death was his own negligence solely, comes from witnesses whose testimony is uncontradicted, unimpeached, not inherently unbelievable and not contrary to physical facts, must the trial court and the court below accept such facts as true?

Both the trial court and the court below refused so to accept such testimony.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The track upon which decedent was killed was immediately adjacent to a loading dock platform. Just to the east of this track was another railroad track which, at the time of decedent's death, was open and wholly unoccupied by any cars (R. 38). Prior to the date of Hertz' death, neither he (R. 36) nor any other switchman had ever attempted to uncouple cars while standing on the west side of the track adjacent to the loading dock platform; everyone had used the opposite side of the track or stood upon the track immediately east of the track upon which decedent was standing (R. 36, 59). Decedent had been a member of this particular switching crew for more than a year (R. 35) and had made this same switching movement practically every night (R. 36). The conclusion is inescapable, therefore, that decedent knowingly and deliberately chose to attempt to uncouple these cars from the dangerous rather than the safe side of the track.

The court below holds that the evidence in this record did not establish any negligence whatever on the part of decedent, and did not establish that he was in a position of peril when killed.

Not only do the facts in this case conclusively show that decedent assumed a position of peril, by the very fact that he was killed while in such a position, but Congress long ago recognized that the necessity of one's going between the ends of cars to couple or uncouple them compelled one to assume a position of extreme peril. For that reason it passed the Safety Appliance Act, 45 U. S. C. A., Sec. 2, 27 Stat. 531, providing that it should be unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any cars used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which

can be uncoupled without the necessity of men going between the ends of the cars." Moreover, in her petition respondent pleaded in every negligence-charging paragraph save one, that decedent was in a position of imminent peril.

II.

The sole proximate cause of Hertz's death was his own deliberate choice of a highly dangerous rather than a perfectly safe place, for uncoupling the cars; and then remaining there and giving the signal for the slack movement.

There is the evidence of but one witness in this case that the four southernmost cars moved a distance of twelve feet towards the south as a result of the slack movement (R. 50, 51). He did not know how far the cars which remained attached to the engine moved or whether the uncoupling was made (R. 56). We must therefore go to the testimony of petitioner's witnesses to ascertain how far the car moved which caught and killed decedent. That testimony shows a movement of that car from a foot to four feet (R. 43, 99, 106).

There was but a single eye-witness to decedent's death. He was on the dock platform directly above decedent when the latter was killed (R. 99). This witness testified that decedent was caught "just as soon as the movement started" (R. 100); that "he got caught immediately" (R. 105); that decedent was not rolled "any twelve feet away" from the witness but only two, three or four feet (R. 107).

Even though it should be assumed that the four southernmost cars were moved a distance of twelve feet as a result of the slack movement, and that the fifth car remained coupled to the remainder of the train, and that it, also, moved a distance of twelve feet, nevertheless because decedent was caught within the first few inches of that

movement, the distance moved by any of the cars thereafter could in no way affect the question of proximate cause. Decedent was killed within the first few inches of the slack movement; and there is no testimony in this record showing that a slack movement of that distance is in any way negligent. Therefore, there is no showing of any negligence on the part of petitioner in the execution of this slack movement. As a result, the proximate cause of decedent's death must have been his own negligence in voluntarily, knowingly and for the first time, choosing a highly perilous rather than a perfectly safe position.

III.

The evidence in support of the first two reasons relied upon for the allowance of the writ herein sought, is uncontradicted, undisputed, unimpeached in any way, not contrary to physical law, and not inherently incredible. Under the decisions of this Court neither the trial court, the jury therein, nor the court below can arbitrarily refuse to give credence to such evidence. The court below did so refuse, and affirmed respondent's verdict herein, contrary to this Court's rulings.

Moreover, if for argument's sake a contradiction should be admitted with respect to the distance the four southernmost cars moved, the evidence on behalf of petitioner is so overwhelming as to preclude the possibility of reasonable minds differing upon its effect, and of accepting the theory of respondent approved by the court below, without disregarding the governing principles announced by this Court.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that court to certify to this Court on a day certain to be named therein, a full and complete tran-

script of the record of the proceedings in said cause of Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, respondent, vs. Terminal Railroad Association of St. Louis, a corporation, appellant, that court's number 38,934, to the end that said judgment of said court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated October 9, 1944, when its motion for rehearing or in the alternative to transfer said cause from Division One of said court to court en banc was overruled, shall be reversed; and that petitioner shall have such relief as to this Court shall seem appropriate.

JOSEPH A. McCLAIN, JR.,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.

BRIEF

In Support of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT.

I.

The jurisdiction of this Court is clear.

Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65;

Judicial Code, Sec. 237, as amended by the act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344;

Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. ed. 1512;

Seago, Adm'x, v. N. Y. Cent. R. Co., 315 U. S. 781;

Stewart v. Southern Ry. Co., 315 U. S. 283;

Brady v. Southern R. Co. (not yet officially published), 88 L. ed., Adv. Op. 189, 191.

II.

Decedent's negligence in voluntarily and knowingly assuming a position of certain, extreme, and imminent peril instead of passing across the track to a position which was perfectly safe, and then giving the signal for the movement which killed him, was the sole proximate cause of his death.

Davis, Agent, etc., v. Hand, 290 F. 731 (certiorari denied 263 U. S. 705, 68 L. ed. 516, 44 S. Ct. 34);

Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787, 73 L. ed. 957;

Atlantic Coast Line R. Co. v. Davis, 279 U. S. 34, 73 L. ed. 603, 47 S. Ct. 210;

B. & O. R. Co. v. Newell, 196 F. 866.

III.

The proximate cause of Hertz' death was the slack movement. The alleged fact that the four southernmost cars moved a distance of twelve feet in response to this slack movement cannot affect the question of proximate cause, for the reason that Hertz had already been killed when the cars moved the first few inches at the commencement of that movement.

Southern R. Co. v. Walters, 284 U. S. 190, 194, 76 L. Ed. 239, 242;
Hunt v. Kane, 100 F. 256.

IV.

Petitioner's evidence as to the distance the car which killed decedent moved is not impeached, contradicted or in any way attacked. The testimony as to twelve foot movement applied only to the four southernmost cars, whereas the car which killed decedent was the car immediately north of the north car of those four. Consequently, both the trial court and the court below was under a duty to accept the testimony of petitioner and decide this case accordingly. This the court below refused to do, and in so doing wrote an opinion directly in conflict with the decisions of this Court supporting the position of petitioner.

P. R. R. Co. v. Chamberlain, 288 U. S. 333, 77 L. ed. 819;
Chesapeake & O. R. Co. v. Martin, 283 U. S. 209, 215, 216, 217, 218, 75 L. ed. 983, 987-989;
Brady v. Southern R. Co. (not yet officially published), 88 L. Ed., Adv. Op. 189;
Southern R. Co. v. Walters, 284 U. S. 190, 194, 76 L. Ed. 239, 242.

ARGUMENT.

I.

The jurisdiction of this Court can scarcely be questioned, in view of the decisions cited under I in the Summary of Argument.

It is desired to call to the Court's special attention, however, the following language from Brady v. Southern R. Co. (not yet officially published), 88 L. ed., Adv. Op. 189, 191:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability Cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." (Citing cases.)

II.

The evidence showing decedent's sole negligence to be the proximate cause of his injury has heretofore been stated. The uncontradicted testimony discloses that decedent was an experienced switchman who had been working with this particular crew for more than a year and who had been coupling and uncoupling cars on the barge, where he was killed, practically every night during that period. On the night of his death he (or anyone else) for the first time so far as anyone knew, attempted to uncouple cars from the west side of the track immediately adjacent to the loading platform; on all previous occasions he and everyone else had done the uncoupling from

the opposite side of the track. Thus, on the occasion of his death he for the first time chose a highly dangerous position to do this work.

After having done so, he himself asked for the slack movement which resulted in his death. The movement was made in response to his signal, and according to the overwhelming weight of the evidence, if not the unwholly uncontradicted evidence, the movement was made in the usual manner.

The court below holds that this evidence does not prove as a matter of law that there was any "certain danger or extreme peril, nor even negligence, in the manner in which Hertz was proceeding to lift the pin."

The conclusion reached by the court on this point is impossible to sustain under the law. The very fact that decedent was killed in this slack movement is sufficient to show conclusively that he was in a position of extreme and certain peril. The Congress has recognized that such a position is extremely hazardous and in response to such recognition has passed the Safety Appliance Act with respect to couplers opening and closing, without the necessity of anyone's going between the cars to open or close them. This act of Congress creates liability upon the railroad upon a mere showing that the couplers failed to couple or failed to uncouple without the necessity of a switchman's going between the cars. The railroad company is made liable for injuries to switchmen or brakemen who are injured by reason of the failure of such couplers to couple or uncouple without any proof of negligence on the part of the railroad company; that is, without any proof that the railroad company acted or failed to act in a careful and prudent manner. The fact alone of the happening of the accident fastens liability upon the railroad company.

Moreover, respondent in her petition pleads in every paragraph thereof save one which does not charge neg-

ligence in the character of the movement of the train, that while he was standing at the point where he was killed decedent was in a position of imminent peril. Despite the recognition by the Congress that such a position is hazardous, despite respondent's own pleading to that effect, and despite the fact that decedent was killed because he was in such a position, the court below has refused to hold that as a matter of law decedent was in a position of peril while uncoupling these cars. That such a holding is unsound can scarcely be denied upon any ground.

It is manifest in this record that decedent was guilty of gross negligence in assuming the position he did for the purpose of uncoupling these cars. The distance between the side of a car and the edge of the loading platform was no more than six or seven inches (R. 19). On the side of each car next to the loading platform is a ladder composed of grabirons. The distance between these grabirons and the edge of the dock is but three or four inches (R. 33).

On the opposite side of the track on the barge was another track which at the time of decedent's death had no cars standing upon it. Decedent could very readily have moved to the opposite side of his track and uncoupled the cars from that point where he would have been perfectly safe (R. 39), and where the switch foreman expected decedent to be at the time the slack was given (R. 36). The foreman had every right to expect decedent to move to the other side of the truck, because for more than a year decedent and all other switchmen had uncoupled these cars from the opposite side of the track (R. 35, 36).

There was ample time for decedent to have moved from the dangerous position to the safe one between the time he gave the signal for the slack movement and the time the slack movement came, because there was a delay of several minutes while the air was pumped up for the

purpose of releasing the brakes on all of the cars of the train except the four which were to be left there (R. 31, 32). Indicative of the elapsed time between the stops made for spotting the cars and the slack movement, is the testimony of respondent's own witness Mulvaney that during the period he broke the seals on the door of the third car from the south end (R. 55), looked inside and saw how the freight was "put in that car" (R. 50); then walked two car lengths to the southernmost car (R. 50), broke the seals on that car door (R. 56), and opened the door of that car (R. 50, 56), and was standing on the dock platform at the time the slack movement came (R. 50). The elapsed time between the time decedent got down between the cars and the happening of the accident was twelve minutes (R. 70, 71); and between the time the foreman last saw decedent alive and the accident was about seven minutes (R. 71). There was a wait of from three to five minutes between the time that the foreman passed decedent's signal for slack and the giving of the slack itself (R. 31, 32).

None of the facts last above stated is contradicted, impeached or attacked in any way. They may be taken, therefore, as the actual facts with respect to the question now being discussed. Under the authorities cited, supra, under Summary of Argument, II, decedent was guilty of gross negligence in voluntarily and knowingly choosing a highly dangerous position to uncouple the cars mentioned in evidence when he well knew and had used for more than a year a perfectly safe way of doing the work. There is no evidence whatever of any negligence on the part of petitioner in respect to that movement. Therefore, decedent's own negligence was the sole proximate cause of his injury.

III.

It is contended by respondent, and the court below affirms respondent's verdict on the theory, that the proximate cause of decedent's death was the twelve foot movement of the cars.

As above indicated, one of respondent's witnesses testified that the four southernmost cars which were to be uncoupled and left on the loading dock, moved a distance of twelve feet following the slack movement (R. 50, 51). No other witness so testified. But that same witness testified that he did not know how far the remaining cars, that is, the cars which were still coupled to the locomotive, moved when the slack movement was made (R. 56). Decedent was not killed by any one of the four cars which respondent's witness testified moved a distance of twelve feet. He was killed by the fifth car, the last car which was to remain coupled to the locomotive. Where is the evidence that car moved twelve feet? Unless that car moved an unsual distance, there can be no liability upon petitioner even under respondent's theory. There is no such evidence.

The switch foreman testified that the fifth car, the car which killed decedent, moved from a foot to a foot and a half (R. 28); the sole eye-witness to this casualty said that the fifth car which caught decedent moved between two and four feet (R. 99, 105). There was no other witness at that point at that time who could testify specifically as to the movement of that particular car. The head brakeman was standing on the top of the third car south of the locomotive. That car moved no more than four or five inches (R. 96); the locomotive scarcely moved, not over six or eight inches (R. 80).

There are, however, conclusive physical facts and undisputed wholly credible testimony which show overwhelmingly that it was impossible for the four southernmost cars to have moved twelve feet when the slack movement

was made. In the first place, it is testified by the locomotive engineer and the head brakeman that in response to the signal for slack, the locomotive engineer did not use any steam power for the purpose of giving the slack, but did no more than momentarily release the air brakes and permit gravity to pull the cars towards the south for the purpose of giving slack (R. 76, 96).

All of the testimony on the subject discloses that decedent had separated the air hose between the fourth and fifth cars from the south end of the cut of cars, and had opened the angle cock on the north end of the fourth car, thereby draining all of the air from the reservoirs on the four cars, and setting the brakes hard against the wheels on those cars (R. 22, 23, 24, 38). The setting of the brakes on these cars rendered it practically impossible that these four cars could have been moved any appreciable distance by the slack movement, as the brakes were set on them too hard (R. 77). Moreover, the undisputed evidence of both the head switchman and the foreman, both of whom were standing on the tops of cars, was that if the cars had been moved that distance, each of them would have been knocked off the cars or would have had to make a long run to counteract the force of the collision (R. 90, 96). Even respondent's witness who testified that the four cars had moved a distance of twelve feet, when asked whether the movement was slow or fast, said: "Well, it didn't move any too fast for the simple reason if he had moved too fast he would have probably hit the bumper post at No. 1 spot" and that did not happen (R. 51); and he refused to say that it was a violent movement (R. 51).

We find, therefore, that a single witness testified that the four southernmost cars moved a distance of twelve feet as a result of this slack movement; but he did not know how far the car which killed decedent moved. Set off against that testimony is that of the engineer, head

switchman and foreman, together with the physical facts that cars with brakes set hard cannot be moved that distance without the use of steam power and only by the force of gravity.

Moreover, the undisputed evidence shows that it was not the twelve foot movement which killed decedent, but that he was killed at the commencement of the slack move, when the southernmost car which was to be left connected with the locomotive had moved no more than a few inches. The truth of this testimony is attested by the physical fact that decedent was caught and remained between the ladder on the side of the car (the south end of which was only three or four inches from the south end of the car) and the loading dock platform. Therefore, it could not have made any difference how far the cars moved after decedent was caught and killed. The proximate cause of his injury must necessarily have been the first few inches of the movement when the slack was given. There is and can be no contention that those first few inches of that movement could in any way have been negligent, because that movement was the inevitable result of decedent's own signal for slack; and because he had voluntarily and purposely chosen a position of imminent peril. His own action in so doing was obviously the proximate cause of his death.

IV.

The opinion of the court below holds that neither it nor the trial court was bound by the testimony of both the engineer and of the head switchman that the engineer did not use any steam power to give this slack movement (R. 76, 96); or by the testimony of the sole eye-witness that decedent was caught and killed within the first few inches of the slack movement (R. 100, 105).

In the opinion of the court below it is said with reference to the testimony of the engineer and the head switchman that no steam power was used:

> "Appellant assumes, as a matter of law, the truth of the testimony of defendant's witness that no power other than the force of gravity was applied in making the slack movement."

With respect to the testimony of the eye-witness that decedent was caught "just as soon as the movement started" the court below said:

> "Appellant relies upon a literal interpretation of the testimony of a witness for defendant, who used the words 'caught just as soon as the movement started,' and appellant insists that the witness' testimony is 'uncontradicted, unimpeached and unattacked in any way' and his conclusion is binding upon the trial court and upon respondent. The evidence, however, is not as limited as appellant contends and inferences, other than those mentioned, may be drawn from the evidence."

This statement will not stand examination. Petitioner does not now and did not in the court below rely upon any "interpretation," literal or liberal, of the testimony of the sole eye-witness. There is no occasion or reason for any interpretation of his testimony. He stated bald facts, namely, that decedent was "caught just as soon as the movement started." There is no room for an interpretation of that language. This is a statement of fact, not a "conclusion" as the court below characterizes it. Obviously this witness meant exactly what he said and said exactly what he meant. He was the only person who saw this casualty and who could know what happened at the exact moment decedent was caught and killed. He has testified positively and unequivocally that decedent was caught and killed just as soon as the slack movement was commenced. No jury and no court has a right to find in the face of this unqualified, unattacked, unimpeached, and entirely reasonable testimony (especially in view of the conceded physical facts showing where decedent was found

after the slack movement was over and the position of the ladder on the car) that decedent was not caught and killed at the commencement of the slack movement. A finding of that sort would be based not only upon a lack of evidence but upon a theory directly contrary to the only evidence in the case.

It seems quite clear that the court below has failed to follow the decisions of this Court, cited in the Summary of Argument, under IV, which hold that evidence of the character of that of the engineer, the head switchman, and the sole eye-witness, when uncontradicted, unimpeached, not contrary to physical laws, and in no way unbelievable, must be accepted by both the court and the jury as true, and the finding and judgment must be based upon the truth of such testimony. If that were not true, the verdict, finding and judgment would of necessity be based upon the exact contrary of the testimony, and would permit a plaintiff to put witnesses on the stand and by them prove a certain state of facts, and then demand of the jury a verdict directly in the face of and contrary to the testimony, and it would have to be affirmed by the appellate court. This court recognizes no such principle of law.

In conclusion, petitioner submits that this record contains no evidence which places responsibility upon it for decedent's unfortunate death; the opinion of the court below is manifestly erroneous, and contrary to the holdings of this Court upon the points here raised, and should not be permitted to stand.

Respectfully submitted,

JOSEPH A. McCLAIN, JR.,
ARNOT L. SHEPPARD,
302 Union Station,
St. Louis, Missouri,
Attorneys for Petitioner.

INDEX.

CASES CITED.

STATUTES CITED.

In the

Supreme Court of the United States

OCTOBER TERM, 1944

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, *Petitioner*,

vs.

NELLIE COPELAND, Administratrix of the ESTATE OF JOHN W. HERTZ, Deceased, *Respondent*.

No. 733

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Missouri

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, respectfully submits this, her brief, in opposition to petitioner's Petition for Writ of Certiorari to the Supreme Court of Missouri.

OPINION OF THE COURT BELOW.

The opinion of the Court below, here sought to be reviewed, is published in the Advance Sheets, 182 S. W. (2d) 600-607; and since respondent has not been furnished with a copy of the printed transcript of record (referred to on page 2 of petitioner's brief) our references herein will be made to the published opinion.

JURISDICTION OF THIS COURT.

The jurisdiction of the Supreme Court of the United States over this cause is not questioned by respondent.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was brought by respondent, in her capacity as Administratrix of the Estate of John W. Hertz, Deceased, against petitioner, under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, Chapter 2, U. S. C., to recover damages for the wrongful death of her intestate, for the sole benefit of intestate's infant daughter, Shirley Hertz, his only heir at law and next of kin.

John W. Hertz, decedent, was killed on December 16, 1941, while engaged as a switchman for petitioner in spotting cars in interstate commerce at the loading dock of the Federal Barge Line, in St. Clair County, Illinois.

Petitioner admits (R. 15) that at the time of his death, decedent, John W. Hertz, was in its employ as a brakeman and engaged in interstate commerce.

THE PETITION.

Respondent's petition alleges: that decedent was working, as a brakeman, under the supervision of petitioner's train foreman, and engaged in spotting cars in interstate commerce at the loading dock of the Federal Barge Line, in St. Clair County, Illinois; that decedent was ordered and directed by petitioner's train foreman, to cut off the air and disengage the coupling between the fourth and fifth cars at the rear (or south) end of said train, which was then stopped and standing at the loading platform on the dock of said Federal Barge Line, and that petitioner, its said foreman, agents and servants, knew, or by the exercise of ordinary care would have known, that decedent, while so engaged, was in imminent peril and danger of being struck and injured by the movement of petitioner's said train.

That with the aforesaid knowledge, the petitioner, its said train foreman, agents and servants, carelessly and negligently: (1) caused and permitted its said train to be suddenly and unexpectedly backed with great force and violence; (2) suddenly and unexpectedly backed its said train, when petitioner knew that its said engine, air hose, air brakes and brake pins, were disconnected and in an unsafe and insecure condition; (3) caused and permitted its said train to be driven backward with great force and violence, when petitioner knew that its brakes were inadequate and insufficient to hold its said train at said loading platform; (4) caused and permitted its said brakes to be released thereby causing its said train to move backward with unusual speed; (5) caused and permitted its said train to be driven backward with great force and violence, when petitioner knew that said fifth car at the rear (or south) end of its said train was of unusual width and did not leave sufficient room for decedent to

pass between said car and said loading platform; (6) that petitioner's said train foreman left decedent with its apprentice brakeman, and moved into a position on top of said fifth car in defendant's said train, where he could neither see decedent or his signals, and from that position signaled petitioner's engineer to release the brakes and to back its said train suddenly and unexpectedly with great force and violence.

Here follows the usual allegations of appointment as administratrix; her qualification as such; the bringing of the suit within less than one year; that the suit was brought for the benefit of decedent's child; that decedent was twenty-seven years old at time of death; that decedent was able bodied; that decedent's infant daughter was his only heir at law, and dependent on decedent for support; and the prayer for damages.

THE ANSWER.

Petitioner, by its answer, admits that decedent was killed at the time and place mentioned in the petition; admits that both decedent and petitioner were at said time and place engaged in interstate commerce; but denies all other allegations.

Further answering, petitioner states that the risk and danger of standing at the point where decedent was injured, was open, obvious, and well known to decedent, and with that full knowledge decedent placed himself in the position which resulted in his death, thereby assuming all risk of injury.

THE EVIDENCE.

Petitioner's train (R. 18) consisted of a locomotive engine, with twenty-five cars attached, (R. 16) with train foreman, Thomas J. Dailey, head brakeman, Clarence B. Newman, rear brakeman, John W. Hertz (decedent), and student brakeman, Quinten Asselmeier, was, at the time in question, engaged in spotting cars in interstate commerce at the loading platform of the Federal Barge Line (R. 15) near East St. Louis, Illinois.

The Federal Barge Line dock (R. 18, 45) consisted of two concrete track barges, laid end to end—north and south—with two concrete warehouse barges, with loading platforms thereon, laid end to end, along, and attached to, the west side of said track barges, and the dock lay in the Mississippi River, just off the east shore.

On (R. 21) the night of December 16, 1941, petitioner's said train, with its foreman and crew, backed onto above mentioned dock for the purpose of spotting the rear (or south) four cars of its said train at "spot points 2, 3, 4 and 5," at the loading platform of the south, or lower, warehouse barge; (R. 19, 20) petitioner's train foreman, student brakeman, and John W. Hertz (decedent) rode on top of the rear (or south) car as the train backed onto the barge; (R. 47, 49) that the foreman of the Federal Barge Line, John Mulvaney, heard the train as it was backing in, and went to the south, or lower, warehouse barge, where he knew the cars were to be "spotted"; (R. 49) and was standing there on the loading platform of that barge when the train backed in and stopped; that the train backed too far south, i. e., beyond the "spot points"; (R. 37) that the train foreman gave his engineer a signal to move the train back north, and just as the train stretched for the move back north (R. 37, 49) the

dock foreman, Mulvaney, told the trainmen to leave the cars where they were; when the train stopped (R. 32) the train foreman was on top of the fifth car from the rear, and the student brakesman, and John W. Hertz (decedent) were on the rear car; that the student brakeman and decedent got off said rear car, onto the platform of the warehouse barge, and walked north to a point opposite the space between said fourth and fifth cars at the rear of said train, where the train foreman met them and directed decedent to disconnect the air, and disengage the coupling, between said fourth and fifth cars, and to leave the rear four cars at the loading platform; (R. 23) that decedent got down off the loading platform and onto the track barge, and stood on the west side of the coupling between the ends of said fourth and fifth cars; (R. 30) while the train foreman stood on top of the south end of said fifth car, looked down and saw decedent manipulate the angle cocks, and disengage the air hose between those cars; (R. 24) that when he saw that all decedent needed was "slack" so he could release the pin and disengage the coupling, (R. 30) petitioner's train foreman left decedent in that position (R. 35) on the west side of said coupling, without warning him, and went to the center of said fifth car where he could neither see decedent, or his lantern, and had to depend on decedent's oral signal; (the evidence shows that petitioner's train foreman could not, and did not, depend on the student brakeman for signals); (R. 72) that about a minute after the train foreman left decedent, the decedent called for "slack", and the train foreman passed the signal for "slack" on to the head brakeman; (R. 31) that after the "slack movement" started decedent's oral signals would have had to been loud enough to overcome the rumble of the cars for the train foreman to have heard them.

That (R. 27) when decedent called for "slack", the train foreman, and (R. 81) the engineer, both knew just what was wanted, i. e. 8 to 10 inches of "slack" so decedent could raise the pin; (R. 40) and also knew that after decedent called for "slack" he was not permitted, under the rules, to cross to the east side between the cars; (R. 31) that it took five minutes to get the "slack" after the signal was given.

LENGTH OF "SLACK MOVEMENT."

Petitioner's train foreman testified, (R. 24, 71) **that it was night;** (R. 73) **that he stood on top in the center of the fifth car when the "slack movement" came;** (R. 28, 43) **that he judged a foot and a half of "slack" came, but that he could not tell how much, because it was night and he had nothing to judge by;** (R. 28, 29) that he heard someone yell, got off the car, and saw decedent crushed between the side of that fifth car and the edge of the loading platform.

Petitioner's student brakeman testified; (R. 99) **that when the "slack movement" came it looked like the 5th car moved two to four feet;** (R. 100) **that it caught decedent just as the movement started;** (R. 104) **that he started yelling when decedent got caught and was scared;** (R. 106) **that at the time he formed his judgment as to the length of the "slack movement", he was scared; that he was watching decedent and saw him trying to raise the pin;** (R. 105) **that decedent's left arm got caught just as the movement started,** and rolled him between the ladder on the side of said fifth car and the edge of the loading platform; **that it (the train) didn't move like the hands on a clock, and it was all over in a second or so.**

The dock foreman of the Federal Barge Line testified: (R. 49) that he stood on the platform of the south, or lower, warehouse barge when the cars backed in; that when the train stopped he opened the door of the car at "spot point 2", looked in, (R. 50) and then **went to the door of the car at "spot point 4", opened that door fully, and was standing at the south door post of that car when the "slack movement" came.** (R. 51) **that those cars moved south twelve feet; that he was not expecting a twelve-foot move, and looked to see what had happened;** (R. 52) saw the student brakeman giving the "washout" signal with his lantern, and then ran north and saw decedent crushed between the side of a box car and the edge of the loading platform.

Petitioner's engineer, testified, (R. 81) that when he got the signal for "slack" from the head brakeman, (R. 80) **that he released the brakes on the engine, let it drop back 6 or 8 inches, and then set the brakes again;** (R. 79) that he did not know whether the brakes were set on the cars in the train or not, that he was the only one who would know, because he handled the air.

Petitioner's head brakeman, testified (R. 96) that he knew nothing of the "slack movement" at the point of accident, that he was too far removed; (R. 96) **that the car he was on dropped back not more than 4 or 5 inches.**

THE TRAIN:

The evidence shows that as the train stood there prior to giving the "slack movement", (R. 37) it was stretched; (R. 77, 78) **that the engine was headed up the river bank on a steep grade; that the cars extended from the engine, down the river bank, across the cradle, up an incline and onto the track barge;** (R. 32) **that the rear eight cars of the train stood on the level, on the track barge.**

DISTANCE BETWEEN CARS:

Petitioner's trainmen testified; (R. 37) **that the train was "stretched" just before the "slack movement" was given,** and (R. 92, 94, 97) **that the space between the ends of the cars in that "stretched" train was between 3 and 4 feet.**

SLACK NECESSARY TO RELEASE PIN:

Petitioner's trainmen testified: (R. 26, 41, 44, 93) that there was **8 to 10 inches of slack in the couplings between cars in a stretched train,** and that it **takes 8 to 10 inches of slack at any particular coupling to release the pin.**

USUAL AMOUNT OF SLACK GIVEN:

Petitioner's trainmen testified: (R. 97) **that when you call for slack, you expect 8 to 9 inches of slack;** (R. 98) **that a foot or two wouldn't be out of the ordinary;** (R. 94) **that a brakeman, standing between the ends of those cars as decedent did, could take care of himself in a slack movement of 8 inches to 4 feet;** (R. 72) **that decedent could have walked along between the ends of those cars when the slack movement came, and not have been hurt, if the cars didn't move too fast.**

The evidence shows (R. 29, 30, 52) that decedent was lodged between the ladder on the west side of the car near its south end, and the edge of the loading platform, in such manner that the platform had to be cut to get decedent out.

That (R. 66) at the time of his death decedent was a healthy, able-bodied, steady working man, 27 years of age, with an average **earning of $200.00 per month,** and an **expectancy in life** (after deducting 7 years because of his occupation) **of 30 years;** (R. 67) that he was divorced

from his wife; that his five-year-old daughter, Shirley Hertz, still lives, and is his only next of kin and heir at law; (R. 68) that decedent contributed $5.00 per week toward the maintenance of his said child; had the child in his custody part of the time, and bought clothes for her; and that this suit was brought by decedent's personal representative for the sole benefit of decedent's said child.

Respondent submitted her case to the jury on the hypothesis (R. 110) that petitioner's negligence consisted in making the slack movement with unnecessary and unusual force and speed.

REASONS RELIED ON BY PETITIONER FOR ALLOWANCE OF WRIT.

Under above heading petitioner propounds, and undertakes to answer, three questions. (P. 9 of its Brief.)

I.

After a review of certain of its evidence, petitioner arrives at what it terms, (P. 10 of its Brief) "The inescapable conclusion, that decedent knowingly chose to attempt to uncouple those cars from the dangerous, rather than the safe side of the track."

The evidence does not warrant petitioner's conclusion; **its trainmen testified: (R. 92, 94, 97) that the space between the ends of the cars in that train was between 3 and 4 feet; (R. 26, 41, 44, 93) that it takes 8 to 10 inches of slack at any particular coupling to release the pin; (R. 97, 98) that the usual amount of slack given to release the pin varies from 8 inches to 2 feet; (R. 94) that a brake-**

man standing between the ends of those care as decedent did, could take care of himself in a slack movement of from 8 inches to 4 feet; (R. 72) **that decedent could have walked along between the ends of those cars when the slack came, and not have been hurt, if the cars didn't move too fast.**

The Court below, in its opinion, says (182 S. W. [2d] 600, l. c. 603-604):

> "From the evidence most favorable to plaintiff, we think the jury could draw the inference that there was no certain danger or extreme peril, nor even negligence, in the manner in which Hertz was proceeding to lift the pin; that his conduct was not the sole proximate cause of his death; and that he would not have been injured or killed, except for the negligence, if any, of defendant's employees in moving the train * * *".

It was not the position in which decedent stood that caused his death, (all trainmen testified that he could have walked along between the ends of those cars in the usual slack movement, and not have been injured) **but the negligence of petitioner's employees who, instead of giving decedent the usual slack movement, gave him,** (R. 51) **twelve feet of slack; that** (R. 105) **didn't move like the hands on a clock; that caught decedent immediately the movement started, and was all over in a second or so.**

Petitioner assumes that if decedent had stood on the east, rather than the west, side of the coupling, he would not have been injured. There is no evidence in the record to that effect, and we submit, that in a slack movement such as was given here, it would have made little difference on which side of the coupling decedent stood.

The Court below says (182 S. W. [2d], l. c. 605):

> "Since he was standing between the cars, immediately west of the drawbars, waiting to lift the pin when the slack came, he was in no danger from the platform, unless thrown into it by the negligent movement of the train."

So here, had he stood on the east side, he might have been knocked down and run over, rather than crushed to death. **It was the negligence of petitioner in making the slack movement "with unnecessary and unusual force and speed,"** rather than the position in which decedent stood, **that caused his death.**

II.

As decedent stood there, waiting for the slack for which he had called, he had the right (since petitioner's train foreman and its engineer both knew just what he wanted), **to expect "the usual slack movement, given in the usual way."**

Petitioner insists that the length of the slack movement be determined by the evidence of its **train foreman,** who testified: (R. 28, 43) **that he judged a foot and a half of slack came, but that he could not tell how much, because it was night and he had nothing to judge by;** and its **student brakeman,** who testified: (R. 99) **that it looked like that fifth car moved from two to four feet;** (R. 106) **that at the time he formed his judgment as to the length of the slack movement, he was scared;** rather than the **dock foreman,** who testified: (R. 50) **that he was standing at the south door post of the car at "spot point 4" when the slack movement came;** (R. 51) **and that those cars moved south twelve feet; that he was not expecting a move of that kind, and looked to see what had happened.**

Prior to that slack movement, **petitioner's train stood with its engine headed up a steep grade on the river bank, the cars dropped back from the engine, down the river bank, across the cradle, and up an incline onto the track barge.**

With the train in that position, we submit, that a movement (R. 80) **of 6 to 8 inches, of the engine,** as testified by the engineer, **and a movement** (R. 96) **of 4 or 5 inches,** as testified by its **head brakeman; could not have, in any manner, effected the slack movement at the point of accident,** and their evidence should not be considered.

The dock foreman, who was standing on the loading platform, **not on a moving car;** and who was three cars south of the point of accident, **and not scared, who was not expecting a 12-foot movement, and looked to see what had happened,** was in far better position to judge the length of the movement than where the other witnesses who testified in this case.

III.

The evidence of petitioner's own train foreman (R. 72) **that decedent could have walked along between the ends of those cars in the usual slack movement, and not have been injured, unless the cars moved too fast; and its student brakeman** (R. 106) **that decedent was trying to raise the pin;** (R. 105) **that decedent's left arm got caught just as the movement started,** and (R. 106) **that it (the train) didn't move like the hands on a clock;** evidence which petitioner says is uncontradicted, undisputed, unimpeached, not contrary to physical law, and not inherently incredible; **is sufficient in itself to warrant a finding that decedent's death was caused by the negligence of petitioner in making the slack movement "with unnecessary and unusual force and speed."**

PETITIONER'S AUTHORITIES.

Davis v. Hand, 290 F. 731; 263 U. S. 705; 68 L. Ed. 516; 44 S. Ct. 34: Plaintiff had completed his duty, gave signal for movement, and then placed himself in a position of danger.

Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787; 73 L. Ed. 957: Plaintiff, while performing no duty required of him, stepped off a foot-board and into the path of a moving train.

Atlantic Coast Line R. Co. v. Davis, 279 U. S. 34; 73 L. Ed. 603; 47 S. Ct. 210: Plaintiff abandoned safe position which he first assumed, and placed himself in a position of extreme peril.

B. & O. R. Co. v. Newell, 196 F. 866: Plaintiff ran alongside a moving train and into a place where employees were excluded by obvious situation.

Southern R. Co. v. Walters, 284 U. S. 190, 194; 76 L. Ed. 239, 242: Held: failure to stop train before entering street crossing, does not show, as a matter of law, that said failure was proximate cause of injury to child who collided with the side of the train.

Hunt v. Kane, 100 F. 256: Held: where engine became defective on run, leaking steam, and engineer couldn't see switchman whose foot was caught in frog because of steam, and couldn't stop because engine was too close when signal was given, defendant not liable.

P. R. R. Co. v. Chamberlain, 288 U. S. 333; 77 L. Ed. 819: Held: an inference of the existence of a particular fact from other proven facts, is not permissible in the

face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.

Brady v. Southern R. Co., 88 L. Ed., Adv. Op. 189: Held: failure to guard against a bare possibility of accident is not actionable negligence.

Chesapeake & O. R. Co. v. Martin, 283 U. S. 209-218; 75 L. Ed. 983-989: Held: jury not at liberty, under guise of passing upon the credibility of a witness to disregard his testimony, when from no reasonable point of view is it open to doubt.

A review of the cases cited by petitioner disclose facts far different than in the present case, and are not applicable under the facts here.

BRIEF.

I.

FEDERAL EMPLOYERS' LIABILITY ACT.

Every common carrier by railroad, while engaged in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent on such employee, for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be entitled to the benefits of this chapter.

Federal Employers' Liability Act, Section 51, Title 45, Chapter 2, United States Code.

The Federal Employers' Liability Act is paramount and exclusive to the legislation of the States prescribing the liability of such carriers to their employees while engaged in interstate commerce.

Railroad v. Vreeland, 227 U. S., l. c. 66.
Adams Express Co. v. Croniger, 226 U. S. 491.
Gulf Ry. Co. v. Hefley, 158 U. S. 98.

II.

NEGLIGENCE.

The mere fact that some other cause operated with the negligence of the defendant, does not relieve it from liability.

I. C. R. R. Co. v. Skinner's Admx., 246 U. S. 663.

Under the Federal Employers' Liability Act, the action lies for "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.

Railroad v. Kerse, 239 U. S. 576.
Going's Admx. v. N. & W. Ry. Co., 248 U. S. 538.
C. V. R. R. Co. v. White, 238 U. S. 507.

Railroad company is liable for the negligence of its engineer in backing engine and tank, when he knew, or had reasonable cause to believe, that brakeman was between the ends of the cars intended to be coupled, if such negligence proximately caused the injury.

Louisiana R. & N. Co. v. McGlory, 20 F. (2d) 545.

CONTRIBUTORY NEGLIGENCE.

Contributory negligence constitutes no defense to an action under Sections 51-60 of this Title.

So. Pac. Co. v. Hackley, 296 U. S. 630.

Generally under this section, contributory negligence of an employee is not a bar to an action for an injury received by him, but only operates to diminish the amount of the damages.

M. St. P. & S. S. Ry. Co. v. Rock, 279 U. S. 410.

Brakeman going between cars to uncouple hose, and uncoupling cars by hand instead of stepping out and using the pin lifter, was not solely responsible for his death from sudden and negligent movement of cars.

C. R. I. & P. Ry. Co. v. Calloway, 282 U. S. 894.

A railroad company is liable where through its employees it is guilty of any causative negligence causing injury to an employee, no matter how slight the negligence is in comparison to the negligence of the injured employee.

N. Y. C. & St. L. T. Co. v. Niebel, 214 F. 952.

IV.

DUTY TO WARN.

The duty to warn employee of unsafe conditions is the duty of the master who cannot avoid responsibility for its non-performance by delegating it to a fellow servant.

Penn. R. Co. v. Minnix, 282 F. 47.

Where the conductor of a train, whose duty it is to look out for the safety of a brakeman working on the same train with him, gave the signal to the engineer to back the train while the brakeman was between the cars, HELD that he was guilty of negligence, rendering the company liable, where, in view of the circumstances, he had good reason to believe the brakeman was in that position.

I. C. R. R. Co. v. Norris, 245 F. 926.

Where the method of doing the work has a direct bearing on safety of servant, the duty is on the master to use reasonable care to provide a safe method, and he cannot escape liability by intrusting its performance to others.

Wilczynski v. Penn. R. Co., 90 N. J. Law 178.

V.

DUE CARE OF EMPLOYER.

An employee owes no duty to exercise care to discover extraordinary dangers arising from employer's negligence, but may assume that employer, or his agents, have exercised proper care for employee's safety until notified to the contrary, unless want of care and resulting danger are so obvious that an ordinarily prudent person would observe and appreciate them under the circumstances.

So. Pac. R. Co. v. Wieand, 309 U. S. 670.

The Federal rule is that the employee's knowledge and realization of extraordinary risk caused by the master's negligence must appear before it can be said that the employee assumed the risk.

Jenkins v. Wabash R. Co., 73 S. W. (2d) 1002, l. c. 1009.

In an action for the wrongful death of a railroad switchman killed while coupling an air hose on a train being made up, it was not error to refuse instruction exonerating defendant if the switching crew had no notice and were ignorant that the deceased was in a position of danger.

Mullen v. A. T. & S. F. Ry. Co., 191 Pac. 206.

VI.

FELLOW-SERVANT RULE.

The object of this chapter is to abrogate the fellow-servant rule in case of injuries to employees, and the negligence of "the officers, agents, and employees" is the negligence of the defendant.

C. R. R. of N. J. v. Young, 232 U. S. 602.

Under this chapter, as a general rule, the employer is liable to his employee for an injury resulting from the negligence of a fellow servant.

Chesapeake R. Co. v. DeAtley, 241 U. S. 310.

To render a railroad company liable for the death of an employee, struck by train, it is not necessary that the railroad company could have anticipated particular injury, but it is sufficient if its negligence is the proximate cause of the injury.

Kidd v. C. R. I. & P. Ry. Co., 274 S. W. 1079, 269 U. S. 582.

VII.

PROXIMATE CAUSE.

Under the evidence here submitted, the issue of proximate cause was for the jury.

C. R. I. & P. R. Co. v. Calloway, Adm'x, 282 U. S. 894.

ARGUMENT.

I.

FEDERAL EMPLOYERS' LIABILITY ACT.

Petitioner admits (R. 15) that decedent, at the time of his death, was in its employ as a brakeman engaged in interstate commerce. This action, therefore, was properly brought under the Federal Employers' Liability Act, by decedent's personal representative for the benefit of decedent's infant daughter, his sole surviving heir at law and next of kin.

II.

NEGLIGENCE.

Under the authorities cited, **petitioner is liable for death resulting, in whole, or in part, from the negligence of any of its officers, agents, or employees.**

Respondent contends that it was not the position in which decedent stood (on the west side of the coupling between those cars), **that caused his death** (all petitioner's trainmen testified there was ample room between the ends of those cars for decedent to have walked along and not been injured in the usual and customary slack movement of 8 inches to 4 feet—the movement which decedent had the right to expect), **but that his death was caused by the negligence of petitioner's employees in the unnecessary and unusual force and speed of that movement.**

The testimony; (R. 105) **"that decedent was caught immediately the movement started, that the cars didn't move like the hands on a clock," and "that it was all over in a second or so,"** given by petitioner's student brakeman; and the further evidence, (R. 50) **"that when the slack came those cars moved 12 feet,"** given by the dock fore-

man, bears out respondent's contention, that the slack movement was made with unnecessary and unusual force and speed.

III.

CONTRIBUTORY NEGLIGENCE.

Even though it could be said that decedent was negligent in taking the position he did between the ends of those cars, and thereby contributed to cause his own injury and death, it would be no defense to this action, and could only be taken into consideration to diminish the damages awarded.

Unless it can be said that decedent's negligence (if negligent he was) **was the sole cause of his death, and that petitioner, and its agents, were free from negligence, decedent's negligence, if any, would not bar recovery.**

IV.

DUTY TO WARN.

It was the duty of petitioner, if decedent assumed a position of "certain and extreme peril," as petitioner says he did, to have warned him.

The evidence shows: (R. 30) that petitioner's train foreman saw decedent there on the west side of the coupling between the ends of those cars; (R. 54) saw that all he needed was slack to release the pin, (R. 73) and knowing that decedent had to remain there until the slack came to raise the pin; (R. 30) left decedent and went to the center of the car where he gave the engineer the signal for slack; (R. 70) that the last time the train foreman saw decedent he was standing between the ends of those cars on the west side of the coupling; (R. 35) that he did not warn

decedent regarding his position; (R. 72) that a minute after he left decedent, that decedent called for slack; and (R. 40) that when he gave decedent's signal for slack to the engineer, he could not see decedent or his lantern.

In the case of I. C. R. R. Co. v. Norris, 245 F. 926, the Court says:

> "Where the conductor of a train whose duty it is to look out for the safety of a brakeman working on the same train with him, gave the signal to the engineer to back the train while the brakeman was between the cars, that he was guilty of negligence rendering the company liable, where, in view of the circumstances, he had good reason to believe the brakeman was in that position. That deceased did not assume the risk of such signal, that he had a right to believe the cars would not be moved while he was between them, and that it was the duty of the conductor, in spite of the fact that he testified that each employee was to look out for himself, to watch out for the safety of those under him."

And the case of Penn. R. Co. v. Minnix, 282 F. 47, the Court says:

> "That the duty to warn employee of unsafe conditions is the duty of the master."

In the present case, **when petitioner's train foreman gave the signal to its engineer for slack, he at least had good reason to believe, that decedent was still on the west side of the coupling between those cars, that is where he left decedent.** He testified (R. 72) that within a minute after he left him, decedent called for slack.

If, as petitioner states "decedent was in a position of certain and extreme peril," it was negligence on the part of petitioner not to have warned him; or to have given the slack in a manner commensurate with the danger.

V.

DUE CARE OF PETITIONER.

Decedent had the right to rely on the exercise of ordinary care on the part of his fellow employees, and **when decedent gave his signal for slack, the meaning of which was well known to both petitioner's engineer** (R. 81), **and its train foreman** (R. 27); **decedent had the right to expect the usual and customary amount of slack, i. e., 8 inches to 3 or 4 feet, given in the usual and customary manner. Decedent did not have to exercise care to discover extraordinary dangers arising out of petitioner's negligence**; he had the right to assume that his fellow employees, who knew what he wanted and knew the position he was in, would exercise due care for his safety.

Instead of receiving the usual amount of slack, in the usual way; decedent received (R. 50) **twelve feet of slack;** (R. 105) **that caught him just as the movement started; that didn't move like the hands on a clock, and was all over in a second or so.**

Under the evidence, we submit, that slack movement was made with "unnecessary and unusual force and speed."

VI.

FELLOW SERVANT RULE.

Under the evidence there is no question but that petitioner's trainmen were negligent in the giving of that slack movement.

The train foreman (R. 30) stood on top of the south end of that 5th car, looked down and saw decedent manipulate the angle cocks, and disconnect the air hose, (R. 24) and when he saw that all decedent needed was slack to release the pin, (R. 30) he left decedent there on the west

side of the coupling between the ends of those cars, (R. 35) without warning him of his position, (R. 73) when he knew that decedent had to remain there until the slack came so he could raise the pin, (R. 30, 31) walked to the center of the car where he could neither see decedent, or his lantern, and had to depend on oral signals alone, and from that position gave the signal for slack to the engineer. Both petitioner's engineer (R. 81), and its train foreman (R. 27) knew just what decedent wanted when he called for slack, i. e., 8 to 10 inches to release the pin; (R. 95) they backed that train 12 feet; (R. 105) a movement that caught decedent just as it started; that didn't move like the hands on a clock, and was all over in a second or so.

Petitioner's trainmen testified (R. 94) that decedent could have walked along between the ends of those cars in the usual slack movement, and not been injured, unless the cars moved too fast.

Petitioner's trainmen were negligent in giving decedent the slack with unnecessary and unusual force and speed, and since the fellow servant rule is abrogated by the Act under which this suit is brought, petitioner is liable.

VII.

PROXIMATE CAUSE.

Decedent, at the time of his death, was standing between the ends of the 4th and 5th cars at the rear (or south) end of petitioner's train, performing a duty which had been assigned him by the train foreman. His position was not a dangerous one, because he could have walked along between the ends of those cars when the slack came and not have been injured, unless, as petitioner's trainmen testify, the movement came too fast.

The evidence here is to the effect that the slack movement in question, was given with "unnecessary and unusual force and speed," and we submit that the question of proximate cause, under the evidence in this case, was for the jury to determine.

CONCLUSION.

We submit, that under the evidence in this case, decedent's death was caused by the negligence of petitioner's servants in giving the slack movement, not in the usual and customary manner, but with unnecessary and unusual force and speed; that the opinion of the Court below is not in conflict with the decisions of this Court; and that petitioner's petition for Writ of Certiorari to the Supreme Court of Missouri, should be overruled.

Respectfully submitted,

CYRUS A. GEERS,
ERWIN B. TUCKER,
Attorneys for Respondent.